In the High Court of Judicature at Madras

Dated:25.01.2007

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The Honourable Mr.Justice A.C.ARUMUGAPERUMAL ADITYAN

Second Appeal No.393 OF 1997

V.Gunasekara Mudaliar ..Appellant/Plaintiff

v

1. M.Mohan
2. M.Arumugham
3. M.Sampath
4. Karpagambal ..Respondents/Defendants

Second appeal filed U/S 100 CPC against the judgment and decree dated 25.11.1996 made in A.S.No.108 of 1994 on the file of court of Principal District Judge, North Arcot District, Vellore, confirming the decree and Judgment dated 14.12.1993 in I.A.No.708 of 1990 in O.S.No.56 of 1989 on the file of Subordinate Judge, Vellore.

For Appellant : Mr.S.Balasubramanian
For Respondents : Mr.Thiruchy R.Thiagarajan.

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JUDGMENT

This appeal has been preferred against the Judgment and decree in A.S.No.108 of 1994 on the file of the Court of Principal District Judge, Vellore. The appellant is the plaintiff in O.S.No.56 of 1989 on the file of the Court of Subordinate Judge, Vellore.

2. The suit was filed for partition of plaintiff's 1/3rd share in the plaint schedule property. A preliminary decree for partition was passed allotting 1/3rd share to the plaintiff and the remaining 2/3rd share in the suit property to the defendants. Against the passing of the preliminary decree, there was no appeal preferred by the parties and thus it become final. A petition for passing of final decree was filed in I.A.No.708 of 1990 in O.S.No.56 of 1989, and a Commissioner was appointed and he filed Ex C1 report and Ex C2 plan. The plaintiff has filed objections to the Commissioner's report stating that a frontage of 4 feet alone was given to him on the southern side,but it

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will be inconvenient for him to enjoy his 1/3rd share which is an extent of 4 feet x 24 feet in the plaint schedule property. According to the plaintiff, it can be used only as a pathway and he cannot enjoy his share which is situated in the suit property conveniently.

3. The learned trial Judge considered the objections filed by the plaintiff in accordance with Ex C1 and Ex C2 and after rejecting the objections made by the plaintiff, passed final decree in terms of the preliminary decree and in accordance with Ex C1 report and Ex C2 plan. Aggrieved by the findings of the learned trial Judge, the plaintiff has preferred an appeal in A.S.NO.108 of 1994 before the learned first appellate Judge. The learned first appellate Judge also considered the objections made by the plaintiff and ultimately held that there is no valid ground in the appeal and consequently dismissed the appeal confirming the judgment and final decree passed by the lower Court without costs. Aggrieved by the findings of the first appellate Court in A.S.No.108 of 1994, this second appeal has been preferred by the plaintiff.

4. The substantial questions of law involved in this appeal are

> "1. Whether the judgment and decree of the Courts below are legally sustainable inasmuch as they have not properly interpreted the sale deed dated 5.10.1981 in favour of the appellant, wherein the appellant has purchased 1/3rd share in the property?
> 2. Whether the judgment and decree of the Courts below are legally sustainable inasmuch as it has accepted the mode of division of the property as given by the Commissioner without consideration of the appellant for the same?
> 3. Whether the judgment and decree of the Courts below are legally sustainable inasmuch as they rejected the application filed by the appellant under Section 2 of the Partition Act?
> 4. Whether the judgment and decree of the Courts below are legally sustainable inasmuch as they have not considered the aspect of convenient enjoyment of the property, when allotting 1/3rd share?

5.The Points:

With regard to the allotment of 1/3rd share in the final decree, there is absolutely no objection raised by the parties. Only with regard to the mode of partition, the plaintiff has filed objection before the trial Court stating that the allotment of 1/3rd share by the learned Commissioner on the western side towards the share of the plaintiff is not convenient for enjoyment. According to the plaintiff, 4 feet

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allotted on the southern side in his 1/3rd share is hardly insufficient to enjoy his 1/3rd share and it can be used only as a passage. Along with the objection, the plaintiff has filed a plan which shows that the plaintiff should be allotted 6 feet frontage on the southern side in the 1/3rd share allotted to him and remaining 6 feet is to be allotted to the defendants. The plaintiff has suggested that while allotting six feet on the southern side towards his 1/3rd share , the total length on the north south direction may be reduced from 24 feet to 16 feet. The learned trial Judge, while passing final decree has considered the said objections raised by the plaintiff, but rejected the same on the ground that the Commissioner has allotted 1/3rd share of the plaintiff on the western side with a measurement of 4 feet x 24 feet. The Commissioner has stated in his report Ex C1 that when plaint schedule building was measured on the east west, inclusive of two walls on each side, the east west measurement comes to 14 feet. But he had a doubt as to whether the walls on either sides exclusively belongs to the plaintiff and the defendants or is a common wall belonging to the parties to the suit on the one hand and neighbouring shop owners, who are having shops on both sides of the suit properties on the other hand. That is why the east west measurement in the suit property has been taken as 12 feet excluding the walls on both sides and the Commissioner has allotted 4 feet towards 1/3rd share of the plaintiff on the east west direction and remaining 8 feet was allotted towards 2/3rd share of the defendants on the east-west direction. Taking into consideration, the objections filed by the plaintiff, the learned trial Judge has observed at paragraph 7 of his Judgment that as per Ex A1 sale deed the plaintiff is entitled to only 1/3rd share in the suit property. So he will be entitled to 4 feet width on the east west direction and the remaining 8 feet is to be allotted only to the defendants towards east west on the south. This has been considered by the Commissioner and accordingly, he has allotted the due shares of the parties with the above said measurement of 4 feet x 24 feet to the plaintiff towards his 1/3rd share, 8 feet x 24 feet to the defendants towards their 2/3 share . The trial Court is of the firm view that if 6 feet is allotted to the plaintiff towards his 1/3rd share on the southern side, it will be affecting the frontage of the defendants and the said loss cannot be compensated when allotting more area for the defendants in the backyard of 1/3rd share allotted to the plaintiff. The appeal preferred by the plaintiff in A.S.No.108 of 1994 was also dismissed on the same ground mentioned in the final decree. Under such circumstances, I do not find any reason to interfere with the well considered Judgment of the first appellate Court in A.S.No.108 of 1994 on the file of the Court of Principal District Judge, Vellore.

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6. In fine, the appeal is dismissed confirming the decree and Judgment in A.S.No.108 of 1994 on the file of the Court of Principal District Judge, Vellore. In the circumstances of the case, there is no order as to costs.

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

sg

To

1. The Principal District Judge, Vellore (with records)

2. The Subordinate Judge,Vellore.

3.The Section Officer,
VR Section, High Court, Madras.

+1cc to Mr.S.Balasubramanian, Advocate Sr 4682

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km/21.2.

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